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Lim Ah Hun v Soon Yee Ling & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–63 OF 2001
DENIS ONG, PS GILL AND HASHIM YUSOFF JJCA
20 JANUARY 2009

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Contract — Sale and purchase of property — Breach — Failure to redeem property within stipulated time — Whether breach resulted in forfeiture of deposit sum — Whether sale and purchase agreement void for uncertainty

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The appellant entered into a sale and purchase agreement ('the SPA') with the respondents to purchase certain pieces of land in Georgetown, Penang ('the property') at a price of RM1,600,992. Upon the execution of the SPA, the appellant paid the respondents a deposit ofRM264,992 as agreed with the balance of the purchase monies amounting to RM264,992 to be paid within one year from the date of the SPA, with the proviso that if the respondents could not deliver vacant possession of the property on the completion date then the completion date would be extended for a further three months without interest. It was also a term of the SPA that the appellant had to redeem the property, which was charged to the bank, within 60 days from the date of the SPA with an extension of one month. When the appellant failed to redeem the property within the time stipulated in the SPA, the respondents terminated the SPA on the grounds that the appellant had committed a breach and forfeited absolutely the sum of RM160,099.20 ('the deposit sum') from the sum of RM264,992 deposited with them. The appellant then applied to the High Court for a declaration that the termination of the SPA was null and void and that it was still subsisting and that the forfeiture of the deposit sum was also unlawful. It was the decision of the High Court that the respondents were entitled to terminate the SPA and forfeit the deposit sum since the appellant failed to redeem the property within the time stipulated in the SPA. This was the appellant's appeal against that decision. The appellant submitted that the term in the SPA that required the appellant to redeem the property within 60 days from the date of the SPA with an extension of one month did not stipulate the consequences of such non-compliance. The appellant also submitted that cl 8 of the SPA provided that if the appellant defaulted in paying the balance of the purchase price then he would forfeit the deposit sum of but there was no provision to forfeit the deposit by reason of the failure to comply with the requirement for payment of the redemption monies within three months. The appellant this argued that since there was no provision regarding the failure to comply with the term that required the appellant to redeem the property within 60 days from the date of the SPA, the SPA was void for uncertainty by virtue of s 30 of the Contracts Act 1950 ('Act'). In reply the respondents

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contended that the appellant could not rely on s 30 of the Act which was neither pleaded nor raised before the High Court. The only issue for consideration in this appeal was whether the appellant's failure to redeem the property within the stipulated time ought to result in the forfeiture of the deposit sum.

Held, allowing the appeal with costs:
In this instant appeal, while there was provision in the event of a default in the payment of the balance of the purchase price, no such provision was made in the event of default in payment of the redemption monies. As such the appellant's failure to comply with the obligation to pay the full redemption sum, did not entitle the respondents to terminate the SPA and forfeit the deposit. It was not for the court to rewrite the SPA to provide for the omission (see paras 13–14).

[Bahasa Malaysia summary

Perayu telah menandatangani perjanjian jual beli ('PJB') dengan responden-responden untuk membeli beberapa bidang tanah yang tertentu di Georgetown, Pulau Pinang ('harta tersebut') pada harga RM1,600,992. Semasa PJB tersebut disempurnakan, perayu telah membayar deposit RM264,992 kepada responden-responden seperti yang dipersetujui bersama baki wang pembelian berjumlah RM264,992 yang harus dibayar dalam tempoh satu tahun dari tarikh PJB, dengan proviso jika responden-responden tidak dapat menyerahkan milikan kosong bagi harta tersebut pada tarikh penyempurnaan, tarikh penyempurnaan akan dilanjutkan kepada tiga bulan tanpa faedah. Adalah menjadi terma PJB juga bahawa perayu perlu menebus harta, yang digadaikan kepada bank, dalam masa 60 hari dari tarikh PJB dengan lanjutan tempoh satu bulan. Apabila perayu gagal menebus harta tersebut dalam tempoh yang ditetapkan oleh perjanjian tersebut, responden-responden menamatkan PJB atas alasan bahawa perayu telah melakukan suatu pelanggaran dan mengambil semula sepenuhnya jumlah sebanyak RM160,099.20 ('jumlah deposit') dari jumlah RM264,992 yang didepositkan kepada mereka. Perayu kemudiannya memohon kepada Mahkamah Tinggi bagi satu deklarasi bahawa penamatan PJB adalah terbatal dan tidak sah dan bahawa ia masih berkuat kuasa dan perampasan jumlah deposit adalah menyalahi undang-undang. Mahkamah Tinggi memutuskan bahawa responden-responden berhak untuk menamatkan PJB dan mengambil semula jumlah deposit memandangkan perayu gagal untuk menebus harta tersebut dalam tempoh yang ditetapkan oleh PJB. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu berhujah bahawa terma di dalam PJB yang mana memerlukan perayu untuk menebus harta tersebut dalam masa 60 hari dari tarikh PJB dengan lanjutan tempoh satu bulan tidak menetapkan sebarang akibat daripada ketidakpatuhan tersebut. Perayu juga berhujah bahawa walaupun klausa 8 dalam PJB memperuntukkan bahawa jika perayu gagal membayar baki wang pembelian, responden-responden boleh

mengambil jumlah deposit tetapi tiada peruntukan membolehkan perampasan jumlah deposit atas alasan kegagalan memenuhi syarat pembayaran wang penebusan dalam masa tiga bulan. Perayu menghujahkan bahawa memandangkan tiada peruntukan mengenai kegagalan memenuhi syarat yang mana memerlukan perayu menebus harta tersebut dalam masa 60 hari dari tarikh PJB, PJB adalah terbatal kerana ketidakpastian berdasarkan s 30 Akta Kontrak 1950 ('Akta'). Bagi menjawab hujahan perayu, responden-responden menghujahkan bahawa perayu tidak boleh bergantung kepada s 30 Akta yang mana tidak diplidkan mahupun dibangkitkan di Mahkamah Tinggi. Satu-satunya isu untuk dipertimbangkan dalam rayuan ini adalah sama ada kegagalan perayu menebus harta tersebut dalam tempoh masa yang ditetapkan membolehkan perampasan jumlah deposit.

Diputuskan, membenarkan rayuan dengan kos:

Dalam rayuan ini, walaupun tiada peruntukan mengenai keingkaran pembayaran baki wang pembelian namun peruntukan tersebut dibuat jika berlaku keingkaran untuk membayar wang penebusan. Dengan itu, kegagalan perayu untuk mematuhi kewajipannya untuk membayar penuh wang penebusan tidak memberikan hak kepada responden-responden untuk menamatkan PJB dan merampas jumlah deposit. Adalah tidak menjadi tanggungjawab mahkamah menulis semula PJB untuk menyediakan peruntukan bagi peninggalan tersebut (lihat perenggan 13–14).]

Notes

For cases on breach, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5060–5066.

Cases referred to

Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd [2000] 3 MLJ 153, CA (distd)

Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd [1996] 2 MLJ 81, CA (refd)

Legislation referred to

Contracts Act 1950 s 30

Appeal from: Originating Summons No 24–1523 of 2000 (MT-1) (High Court, Pulau Pinang)

K Balasundram (Jason Ong with him) (Cheah, Kah Peng & Ong) for the appellant.

S Rajendran (Mohd Imtiaz, Choong & Partners) for the respondents.

Hashim Yusoff JCA:

[1] We unanimously allowed this appeal. I now give our reasons.

BACKGROUND FACTS

[2] The appellant/plaintiff had entered into a sale and purchase agreement with the respondents/defendants dated the 11 April 2000 ('the SPA') whereby he had agreed to purchase and the respondents/defendants agreed to sell some pieces of land in Georgetown, Penang ('the said property') at a price of RM1,600,992. The appellant had received a deposit of RM264,992 on execution of the SPA and the balance of RM1,336,000 was to be paid within one year from the date of the SPA with the proviso that if the respondents could not deliver vacant possession of the said property on the completion date, then the appellant shall extend the completion date for a further period of three months without interest, and thereafter if the respondents still could not hand over vacant possession on the extended completion date, then the appellant shall extend the extended completion date for a further period of three months.

[3] The said property was sold subject to a tenancy agreement dated 1 March 1998 ('the said tenancy agreement') whereby the appellant was entitled to collect rental at RM6,500 per month from the date of the SPA. The said property had been charged to the bank and the appellant was to redeem the said property within 60 days from the date of the SPA with an extension of one month. The appellant had applied for a bank loan of RM800,000 which was approved on 26 June 2000.

[4] On 21 July 2000 the respondents terminated the SPA when the appellant failed to comply with section 4 of the Fourth Schedule of the SPA which reads:

> The Purchaser shall pay the full redemption monies for the said Property owing by the Vendor to Standard Chartered Bank Malaysia Berhad and Asia Commercial Finance (M) Berhad within sixty (60) days from the date hereof with an extension of one (1) month.

AT THE HIGH COURT PENANG

[5] The appellant then sought a declaration in the High Court that the termination of the SPA was null and void and that it was still subsisting and that the forfeiture of the deposit sum of RM160,099.20 by the respondent was also unlawful. The learned High Court judge held that since the appellant failed to redeem the said property within 60 days as stipulated in the SPA, therefore the respondents were entitled to terminate the said SPA and forfeit

A the deposited sum. Dissatisfied, the appellant is now appealing against the decision of the High Court.

THE APPEAL

B **[6]** Learned counsel for the appellant, submitted that there is only one central issue ie whether the respondents were entitled to forfeit the deposit of RM160,099.20 because of the appellant's failure to redeem the said property from the chargees even before the completion date of the SPA for the payment of the balance of the purchase price. He then referred to para 6 of the First C Schedule of the SPA which states that the amount of deposit payable on the execution of the SPA was RM264,992. But under section 11 of the same Schedule, the amount of forfeitable deposit was only RM160,099.20. Paragraph 9 of the First Schedule stipulates the time and manner of the payment of the balance of the purchase price.

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[7] Learned counsel for the appellant submitted that no where is it stated in the SPA, regarding the consequence of the appellant's failure to pay the redemption sum within three months as required under para 2 of the Fourth Schedule to the SPA. Under cl 8 of the SPA one of the consequences of default E by the appellant to pay the balance of the purchase price or any payment thereof pursuant to cl 2 of the SPA is the forfeiture of the RM160,992.20. But there is no provision to forfeit the deposit by reason of the failure to comply with the requirement for payment of the redemption monies within the time stated (three months) under para 2 of the Fourth Schedule. F

[8] Reference was made to the case of *Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd* [1996] 2 MLJ 81 where the Court of Appeal, inter alia, held:

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> (1) An option clause is void for uncertainty unless the agreement provided the machinery or some formula which the courts can utilise to ascertain what is otherwise unascertainable without the parties coming to an agreement. The courts will not lend their aid to the enforcement of an incomplete agreement. In the instance case, the rental for the renewed period of the tenancy had to be H agreed by the parties. The agreement for renewal as executory and there was no machinery or formula for the court to ascertain the rent if the parties could not come to an agreement on the rent. On authority and on principle, the alleged agreement was bad for uncertainty. Thus, the option clause for a further term at 'a rent to be agreed' was void for uncertainty and there was no need for a trial to come to that conclusion.

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[9] Learned counsel for the appellant further submitted that since there is no provision regarding the failure to comply with para 2 of the Fourth Schedule, therefore the SPA is void for uncertainty by virtue of s 30 of the Contracts Act 1950.

[10] In reply, learned counsel for the respondents submitted that s 30 of the Contracts Act 1950 was not pleaded nor canvassed in the High Court and it should not be argued before us. He then relied on the case of *Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd* [2000] 3 MLJ 153 where, the brief facts are as follows:

> The plaintiff instituted proceedings against the defendant for specific performance of an agreement contained in a letter, in particular para (c) thereof, which was for the defendant to execute the transfer of eight titles named in the paragraph to the plaintiff. Paragraph (d) of the agreement stated that the plaintiff had to pay Malayan Banking Bhd RM1,186,640 in order to obtain the release of the said eight titles and the defendant's 23 titles from the bank. The plaintiff had failed to pay the sum demanded by the bank and it managed to get from the bank only the 23 titles which belonged to the defendant and which it kept.

[11] The Court of Appeal in that case, in allowing the defendant's appeal to dismiss the plaintiff's action held, inter alia:

> (1) The obligation of the defendant under para (c) was merely a subsidiary term, the non-performance of which did not relieve the plaintiff from his primary obligation under para (d). The obligation of the plaintiff under para (d) was a fundamental term. Therefore the promise of the defendant to execute the eight transfers in para (c) could not be claimed by the plaintiff till the plaintiff's own promise in para (d) had been performed. The non-performance of the plaintiff's promise to pay the bank in full and to recover all the 31 titles from the bank was fatal to its case. If the plaintiff failed to perform its promise in para (d), it could not claim the performance of the reciprocal promise by the defendant in para (c) by virtue of s 55 of the Contracts Act 1950. If the plaintiff was not entitled to make such a claim against the defendant till its own obligation in para (d) had been performed, then its action against the defendant must surely fail.

THE COURT'S FINDING

[12] The respondents through their solicitors' letter dated 21 July 2000 addressed to the appellant's solicitors informed them that the appellant/plaintiff had committed a breach of the said SPA by failing to make the payments pursuant to para 2 of the Fourth Schedule of the SPA within the time stipulated. In the circumstances the respondents thereby terminated the said SPA and forfeited absolutely the sum of RM160,099.20 as set out in section 11 of the said SPA from the sum of RM264,992 deposited pursuant to section 6 of the First Schedule of the said SPA as agreed liquidated damages.

[13] It is to be noted that, as submitted by learned counsel for the appellant, para 2 of the Fourth Schedule only stipulates the appellant's obligation to pay the full redemption sum. There is no mention of the consequences of any default in the payment of such redemption monies. Only cl 8 of the SPA which refer to a failure to pay the balance of the purchase price under cl 2 of the SPA provides that the SPA shall become null and void. It does not refer to the non-payment in full of the redemption monies.

[14] With respect to the learned High Court judge, I cannot agree that the appellant's failure to comply with para 2 of the Fourth Schedule would entitle the respondents to terminate the SPA and forfeit the deposit as there is no specific provision to enable them to do so. The case of *Dial Kaur* is distinguishable because in that case it was held that the failure of the plaintiff to pay the sum demanded by the bank in order to obtain the release of the eight titles kept by the bank to enable the defendant to execute the transfer of the said eight titles to the plaintiff, was fatal to the case. In this instant appeal, while there is provision in the event of a default in the payment of the balance of the purchase price, no such provision is made in the event of default in payment of the redemption monies. It is not for the court to rewrite the SPA to provide for the omission.

[15] For the above reasons, we allowed the appeal with costs to the appellant. The order of the High Court is set aside. The deposit is also to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kohila Nesan